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Nos. 01-1118, 01-1119

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JOSEPH SCHEIDLER, ET AL.,

Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.,

Respondents.

OPERATION RESCUE,

Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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Amicus Brief of Life Legal Defense Foundation In Support of Petitioners

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Interest Of Amicus[1]

Amicus Life Legal Defense Foundation (LLDF) is a California non-profit corporation which provides legal assistance to pro-life advocates. LLDF was established in 1989, when massive arrests of pro-life advocates engaging in non-violent civil disobedience (often called "rescues") created the need for attorneys and attorney services to assist those facing criminal prosecution. Most of these prosecutions resulted in convictions for trespass and blocking, sentences consisting of fines, jail time, or community service, and stern lectures from judges about the necessity of protesting within the boundaries of the law.

By 1991, most of these pro-life advocates had turned to other entirely lawful means of preventing abortions, including assisting women in crisis pregnancies, counseling women outside abortion facilities, and picketing, leafleting, and praying at appropriate locations, including abortion facilities. Rather than applauding this conversion to lawful forms of pro-life activism, abortion supporters have almost uniformly refused to acknowledge that there is essentially any difference between the rescue blockades of the late '80's and the lawful protest of the '90's. They consider both to be unlawful interference with, and harassment of, women seeking abortions with the only difference being that the civil disobedience of the '80's occurred only sporadically, whereas sidewalk counselors and picketers appear weekly, sometimes daily —and the police will not arrest these pro-life activists because their conduct is lawful. For that reason, in the early to mid-90's, many abortion providers sought injunctions against pro-life picketers. *See infra*, Section III.

The abortion providers soon realized that the most effective way to seek injunctive relief was to invoke the name "Operation

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[1] This brief was not written in whole or in part by counsel for a party. No one other than amicus Life Legal Defense Foundation made any monetary contribution to its preparation. Written consent of the parties to the filing of amicus briefs have been filed with the clerk.

Rescue", a group known for civil disobedience and "rescues" in the '80's. One or two "rescues" in a defendant's past has been the key to obtaining an injunction restricting his or her lawful picketing, practically speaking, forever.[2] To this day, abortion providers and supporters gather and maintain data on who is "associated" with Operation Rescue, meaning who of today's peaceful picketers attended a blockade or Operation Rescue rally ten years ago.

Amicus LLDF fears that the nationwide RICO injunction issued in *NOW v. Scheidler* or to be issued by courts emboldened by the Seventh Circuit's affirmance in that case will be used, or abused, by abortion providers to intimidate pro-life speakers because of their past participation with Operation Rescue[3] or Pro-Life Action Network ("PLAN"), or to intimidate them from future involvement with these groups, or even groups that associate with these groups, in completely lawful First Amendment protected activities. Involvement in *lawful* protest activi-

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[2] See, e.g., *Planned Parenthood Ass'n of San Mateo County v. Operation Rescue Of California*, 50 Cal. App. 4th 290, 305 (1996), cert. denied, 522 U.S. 811 ("Cochran testified that he has contributed money to Operation Rescue, receives mailings from Operation Rescue, and has attended rallies and rescues (including those at this clinic) organized by Operation Rescue. When asked on cross-examination 'You've been involved with that organization for . . .' Cochran answered 'For a few weeks.' This is enough to justify treating Cochran as either a member of Operation Rescue, or as sufficiently associated with it that he is bound by the injunction against that entity"). Cochran's uncontradicted testimony was that he was present at the rescues at the subject clinic because he picketed at the clinic every Saturday, and so he was there when Operation Rescue appeared. His testimony that he did not participate in the blockades was corroborated by a clinic employee. Yet, his mere presence, combined with constitutionally protected associational activity such as giving money and receiving mailings, was held sufficient to deprive him of his constitutional right to demonstrate on the public sidewalk.

[3] Respondents apparently intend just such a result: "In addition to the co-conspirators listed in Exhibit B, there are hundreds or thousands of unidentified co-conspirators who have joined forces with the RICO defendants to commit racketeering activity aimed at closing clinics that perform abortions." Plaintiff's Amended RICO Case Statement, S. App. 378, 381. In Respondents' view, co-conspirators also include anyone who attended a PLAN meeting and then committed an illegal act in furtherance of the conspiracy. Tr. 2237:25-2238:22.

ties with any "Operation Rescue" entity, at abortion facilities or elsewhere, might be deemed sufficient to bring someone within the scope of the injunction. Thus, not only the "rescuer" from days gone by, but the person who, for example, lawfully distributes leaflets at a school in conjunction with Operation Rescue or PLAN today may find himself or herself subject to the jurisdiction of the United States District Court for the Northern District of Illinois or any other court which issues a nationwide injunction under RICO to private litigants. LLDF is gravely concerned that "guilt by association" will be the rule of the day in courts bound to or inclined to follow the Seventh Circuit. Leaders of pro-life organizations (or any social movement for that matter) lawfully engaged in social protest will be silenced for fear they will be held liable if any of their followers engage in independent acts which go beyond lawful protest.

I. The Seventh Circuit's Expansive Interpretation Of The Hobbs Act Is Unwarranted And Dangerous

The Seventh Circuit's decision in this case does not stand alone. It is one piece of a larger pattern of construing harm broadly in the context of abortion protests, particularly where private plaintiffs seek injunctive relief. The term "blocking" means any interference with "unfettered" access, i.e., cars having to slow down as they turn into a clinic driveway. *Madsen v. Women's Health Center*, 512 U.S. 753 (1994). "Threats" includes rhetoric not addressed to the allegedly threatened individual but to a wide audience, which contains no reference to violence or unlawful conduct. *Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 290 F. 3d 1058 (2002). "Unwanted speech" means speech which has not been affirmatively consented to by a listener. *Hill v. Colorado*, 530 U.S. 703 (2000).[4] And now "extortion" requires no obtaining and no property, but means any interference with the exercise of a right, including by non-violent physical obstruction.

What sets this case apart from the others is that this particular exercise in elastic linguistics expands federal jurisdiction enormously, in both civil and criminal contexts. The Hobbs Act becomes a prosecutorial Deluxe Swiss Army Knife, useful in just about any situation. With the Hobbs Act to supply predicate acts under RICO, private litigants can take garden-variety tort allegations and, as the saying goes, make a federal case out of it.

This issue presented here is not whether the petitioners should be or in fact have been punished for any wrongful acts they committed over ten years ago. The issue is not whether parties dam-

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[4] This case involved a challenge to a state statute, not litigation between private parties.

aged by wrongful conduct are entitled to compensation.[5] Nor is the issue whether a special exemption for petitioners and their activities should be carved out of generally applicable laws.

The specific issue presented here is whether there are limits to the relief Congress intended to be available for addressing unlawful acts, or whether Congress intended RICO to confer federal jurisdiction, including a right to nationwide injunctive relief, wherever a plaintiff alleges that a defendant committed two acts which interfered with the plaintiff's exercise of a right, as that term is most expansively interpreted.[6]

The more general and more troubling issue is whether we are to functionally abandon our commitment to the concept of criminal law as a body of reasonably clear prohibitions or restrictions on conduct, accompanied by reasonably well-defined penalties for violations. When courts can stretch the language of a law to make it encompass conduct which no reasonable person, not even a very imaginative reasonable person, would ever have dreamt of, and in so doing can increase the penalties for such conduct exponentially, then the rule of law has been gutted. It doesn't matter that the distance from Written Law A to Interpretation Z was made in numerous smaller steps, each in and of itself appearing a mere logical extension of the prior step. If the end result is absurdity, i.e., that momentarily blocking a sidewalk is "extortion,"

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[5] It should be noted that, for all Respondents' rhetoric about the Petitioners' reign of terror and violence, not a single penny was sought or awarded for any physical damage to persons or property. The only damages awarded were for increased security costs which the Respondents attributed to the Petitioners. Respondents' inability to establish any concrete damages worth suing for, much less the Petitioners' responsibility for such damages, might explain why they did not pursue ordinary tort claims but instead elected to pursue this imaginative claim under RICO.

[6] Given the extremely broad, one might say fantastic, interpretations of "obtaining" and "property" embraced by the Seventh Circuit, it is difficult to envision a court which follows this ruling finding the Hobbs Act requirement that the unlawful conduct "affects commerce" to be an insuperable barrier to jurisdiction.

that stepping on a plant is "robbery," and that doing these acts twice makes one a racketeer, then the law has become arbitrary and capricious, deserving of fear but not of respect.

II. Private Injunctive Relief Under RICO Will Encourage Plaintiffs To Use Federal Courts To Obtain Nationwide Injunctive Relief For Conduct And In Contexts More Properly Dealt With By State Courts

As discussed at length in the briefs of the petitioners, the Seventh Circuit decision permitting private civil litigants to obtain injunctive relief under RICO directly conflicts with that of the Ninth Circuit in *Religious Technology Center v. Wollersheim*, 796 F.2d 1076 (9th Cir. 1986). The Ninth Circuit conducted a thorough examination of the text and legislative history of RICO and determined that the remedy available to private plaintiffs was limited to treble damages. This decision has been followed in subsequent Ninth Circuit cases, as well as in cases in other circuits, with good reason. See Pet. at 11, n. 17.[7]

This Court and other courts have long complained about private litigants' manipulation of RICO for purposes of the intimidation the heavy hammer of treble damages and attorneys' fees can provide. This Court and many appellate courts have had to cope with the virtually unlimited creativity of lawyers in transforming commonplace business conflicts into complex civil RICO actions. One can only imagine what private litigants and their attorneys will plead if they believe they can transcend the jurisdictional bounds of state courts' equity powers and obtain a ***nationwide*** injunction and a right to recover attorneys' fees to boot.

The permanent RICO injunction issued in *NOW v. Scheidler* involves more of the same stretching of RICO far beyond Congress' intent. Not surprisingly, the injunction issued exceeds the relief

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[7] All citations to the Petition (Pet.) and Petition Appendix (Pet. App.) are to the pertinent documents in No. 01-1119.

allowable under RICO. That injunction does not enjoin RICO violations. Rather it enjoins the commission of petty offenses such as trespass and vandalism, Pet. App. 279a, which any state court could do as well within the jurisdictional limits posed by state lines.

The equity jurisdiction afforded to district courts under RICO is limited by an express statement of purpose: "to prevent and restrain violations of section 1962." 18 U.S.C. § 1964(a). Section 1962 prohibits conduct otherwise not criminal in and of itself, e.g., the investment of income derived from racketeering activity for the purpose of acquiring an interest in, establishing, or operating any enterprise (18 U.S.C. § 1962(a)), the acquisition of an interest in or control of an enterprise through a pattern of racketeering activity (18 U.S.C. § 1962(b)); the conduct of an enterprise's affairs through a pattern of racketeering activity (18 U.S.C. § 1962(c)); or the conspiracy to violate any of the foregoing provisions (18 U.S.C. § 1962(d)). The commission of miscellaneous crimes—even the predicate offenses which may give rise to a "pattern of racketeering activity"—is not prohibited by RICO since these offenses are crimes in themselves.

Hence a district court's authority to issue injunctive relief under RICO is limited to the prevention of RICO violations, i.e., violations of section 1962. Injunctive relief is not authorized under RICO merely to prevent the commission of predicate offenses, much less petty offenses like trespass, since state courts are presumably capable of enjoining the commission of such acts. Thus the examples Congress expressly delineated in section 1964(a) as appropriate injunctions under RICO include:

> ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any

enterprise, making due provision for the rights of innocent persons.

Except for the boilerplate prohibition on "operating an enterprise," the instant injunction does not prevent and restrain RICO violations, i.e., violations of section 1962, but instead purports to enjoin the commission of acts which Respondents contend constitute predicate offenses, namely, violations of the Hobbs Act. If the injunction were intended to prevent or restrain RICO violations it must necessarily identify the "enterprise" which is the subject of the RICO violation. The instant injunction is not a legitimate exercise of authority under RICO but instead appears to use vague RICO terminology to obtain a nationwide injunction to restrain conduct which a state court already has the power to control. Cf. *U.S. v. Private Sanitation Industry Ass'n of Nassau/Suffolk, Inc.*, 995 F.2d 375 (2d Cir. 1993) (enjoining defendant from participating directly or indirectly in carting industry and associating with co-defendants or known members and associates of organized crime for any commercial purpose was within scope of RICO's civil remedies.); *U.S. v. Local 30, United Slate, Tile and Composition Roofers*, 871 F.2d 401 (3d Cir. 1989), cert. denied, 493 U.S. 953 (1990) (individual defendants enjoined from participating in union's affairs and continuing to be employed in construction industry within union's jurisdiction).

The prohibition on "operating an enterprise," central to the maintenance of federal court jurisdiction, cannot be treated as a superfluity or "boilerplate." It should have been carefully and explicitly defined to ensure those charged, or who may be charged, with responsibility to comply understand what is—and is not—prohibited.

To uphold the Seventh Circuit's decision will encourage plaintiffs to contrive a civil RICO violation to obtain federal jurisdiction and obtain a nationwide injunction which enjoins nothing more than the commission of predicate offenses, or, as in this case, even petty offenses alleged to be components of predi-

cate offenses. Indeed, if this Court affirms the Seventh Circuit's unmooring of injunctive relief under RICO from its statutory purpose, other courts will undoubtedly move beyond enjoining criminal acts to ordering prophylactic injunctive restrictions on speech, such as speech-free zones,[8] cease-and-desist provisions,[9] and invitation-only requirements,[10] all of which have been defended as necessary to prevent petty criminal or tortious behavior.

It gets worse. Once such restrictions on otherwise constitutionally protected activity are in place on a nationwide, one-size-fits-all basis, the issue will become who is bound by the injunction, and which injunction they are bound by. On this issue, too, the Seventh Circuit's decision has laid the groundwork for a massive expansion of federal jurisdiction.

It is settled law that a court has no power to enjoin acts of non-parties to an *in personam* proceeding, except where such persons are knowingly and purposefully aiding and abetting a named party to violate the injunction. Fed. R. Civ. P. 65(d); *Chase National Bank v. City of Norwalk*, 291 U.S. 431, 436-37 (1934) (reversing order which "assumed to make punishable as contempt the conduct of persons who act independently and whose rights have not been adjudged according to law"); *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 14 (1945) (courts may not grant an injunction "so broad as to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to law"; principle of applying injunctions to nonparties is that "defendants may not nullify a decree by carrying out prohibited acts through aiders and abettors"); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 112 (1969) (reversing post-judgment entry of injunction against non-party who was not shown to be in concert or participation with named parties); *Alemite Manu-*

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[8] Cf. *Madsen v. Women's Health Center*, 512 U.S. 753 (1994).

[9] Cf. *Schenck v. Pro-Choice Network*, 519 U.S. 357 (1997).

[10] Cf. *Hill v. Colorado*, 530 U.S. 703 (2000).

facturing Corp. v. Staff, 42 F.2d 832 (2d Cir. 1930) (L. Hand, J.); *U.S. v. Kirschenbaum*, 156 F.3d 784 (7th Cir. 1998).

In stark contrast, however, the Seventh Circuit interpreted the reach of the district court's injunction to encompass the independent acts of non-parties: "If individuals acting in concert with the defendants or PLAN violate the injunction, ***without inducement or direction by the defendants***, the violators, ***not the defendants***, would be in contempt of the court's order." Pet. App. 31a (emphasis added).

The Seventh Circuit thus created a previously unheard-of category of potential contemnors, i.e., persons closely enough associated with the defendants to be bound by the terms of the injunction, but not so closely associated as to be acting with the "inducement or direction" of the defendants. Such a category is a legal and logical impossibility:

> [T]he only occasion when a person not a party may be punished is when he has helped to bring about, not merely what the decree has forbidden, because it may have gone too far, ***but what it has the power to forbid, the act of a party***. This means that the respondent must either abet the defendant, or must be legally identified with him.

Alemite, 42 F.2d at 833 (emphasis added). More recently, in an abortion protest case, the Second Circuit, citing *Alemite*, held:

> In order for a court to hold a nonparty respondent in contempt of a court order, "***the respondent must either abet [the party named in the order], or must be legally identified with him.***" [citation omitted.]. . . . An injunction issued against a corporation or association binds the agents of that organization ***to the extent they are acting on behalf of the organization.*** [citation omitted.] Generally, persons who cease to act in one of the designated capacities are no longer bound by the decree.

People v. Operation Rescue National, 80 F.3d 64, 70 (2d Cir. 1996) (emphasis added).

The Seventh Circuit's holding that non-parties could be held in contempt without the defendants is at odds with long-established case law on the subject of nonparty contemnors: "[A] key principle in cases binding a nonparty who is not legally identified with a party is that a person properly named in the injunction must have had a material role in the subsequent violation of that injunction." *G.&C. Merriam Co. v. Webster Dictionary Co. Inc.*, 639 F.2d 29, 35 (1st Cir. 1980). *See also United Pharmacal Corp. v. U.S.*, 306 F.2d 515, 517-18 (1st Cir. 1962) ("if the person enjoined is not involved in the contempt, an employee, and by the same token one in active concert or participation, cannot be either, because the decree has not been violated"); *Herrlein v. Kanakis*, 526 F.2d 252, 254 (7th Cir. 1975) ("Since neither [named party] was found in violation of the order, [non-party] cannot be held liable as an aidor or abettor of the named parties in violating the injunction").

This element of third-party liability, i.e., the required joint liability of an enjoined party for any contemptuous act, acted as a brake on an overly expansive interpretation of "acting in concert." By disposing of this element, the Seventh Circuit has redefined the phrase "acting in concert" to mean mere association with an enjoined party, or, more simply put, guilt by association.[11]

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[11] Unfortunately, courts need little encouragement to follow the Seventh Circuit's example and make this transition. As one commentator noted, "When people who oppose a majority social policy are diffuse but united by unrelenting zeal, the majority always finds it difficult to enforce that policy. It may, therefore, resort to injunctions to attempt to carry out that policy. Non-agent, independent violators, however, complicate enforcement under conventional agency or active concert doctrine. . . . The judge who constructs doctrinal mechanisms to impose sanctions on a minority that frustrates a majority policy and flouts a judicial decree will receive general approbation. . . . But it sacrifices procedural protections to social exigency and almost destroys the distinction between litigation and legislation." Rendleman, *Beyond Contempt: Obligors to Injunctions*, 53 Texas L. Rev. 873, 902-03 (1975).

In the instant case, the injunction has been loosed from its moorings of prohibiting unlawful racketeering-related acts by the named defendants, and instead becomes a means of intimidating individuals from associating with the enjoined parties (which include organizations of alleged nationwide reach, according to the plaintiffs) in *any* activity, lest they come under the jurisdiction of the court as persons "acting in concert" with the parties.

By affirming the injunction, the Seventh Circuit failed to restrain the impermissible reach of the injunction over innumerable individuals and organizations not before the court. Private injunctive relief under RICO thus not only entails vesting district courts and private parties with sweeping powers to prohibit and prosecute conduct, both lawful and unlawful, on a nationwide basis, but to use such power against individuals who have never had their day in court.

III. The Imposition Of A "Nationwide Injunction" Creates Substantial Conflicts With The Jurisdiction Of Other State And Federal Courts

Respondents are not the first parties to have been awarded injunctive relief against abortion protests. Rather, their only claim to distinction is the length of time it took them to secure an injunction. During the thirteen years this action was pending in the District Court, scores of injunctions involving anti-abortion protesters have been issued by state and federal courts in other jurisdictions.

Amicus is aware of over thirty actions filed in California alone since 1985, all seeking injunctive relief against anti-abortion protests. In some of these actions, the plaintiff abortion providers were completely or partially successful.[12] In other actions, they

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[12] See, e.g., *Planned Parenthood Shasta-Diablo, Inc. v. Williams*, 10 Cal. 4th 1009, 898 P.2d 402, 43 Cal. Rptr. 2d 88 (1995) cert. denied, 520 U.S. 1133 (1997); *Planned Parenthood of San Diego and Riverside Counties v. Wilson*, 234 Cal. App. 3d 1662, (1991); *Planned Parenthood Ass'n of San Mateo County v. Operation Rescue*,

failed to obtain relief and the action was dismissed.[13] At least two injunction actions are pending at this time in California.[14]

Many of these actions, both within and outside of California, included "Operation Rescue" as a defendant.[15] In the instant case,

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50 Cal. App. 4th 290, 57 Cal. Rptr. 2d 736 (1996) cert. denied, 522 U.S. 811 (1997).

[13] See, e.g., *Planned Parenthood Shasta-Diablo v. Operation Rescue* (Butte County Super. Ct. No. 115924) (filed 3/93); *Kenneally v. Operation Rescue, et al.*, (L.A. Super. Ct. No. BC 075178) (filed 3/93); *EDP v. Vargovcik, et al.*, (L.A. Super. Ct. No. BC 092929) (filed 11/93).

[14] *Wilkerson, et al. v. Scott, et al.* (San Diego Super. Ct. No. 728883) (filed 3/99); *Foti v. Planned Parenthood* (San Mateo Super. Ct. No. 405649) (cross-complaint filed 9/98).

[15] Inside California: *Feminist Women's Health Center v. Blythe*, 32 Cal. App. 4th 1641, 39 Cal. Rptr. 2d 189 (1995) cert. denied, 516 U.S. 987 (1995); *National Abortion Federation v. Operation Rescue*, 721 F. Supp. 1168 (C.D. Cal. 1989), rev'd, 8 F.3d 680 (9th Cir. 1993); *Planned Parenthood Association of Santa Barbara, Ventura, and San Luis Obispo Counties v. Aakhus*, 14 Cal. App. 4th 162 (1993); *Planned Parenthood Ass'n of San Mateo County v. Holy Angels Catholic Church*, 765 F. Supp. 617 (N.D. Cal. 1991); *Planned Parenthood Ass'n of San Mateo County v. Operation Rescue of California*, 50 Cal. App. 4th 290, 57 Cal. Rptr. 2d 736 (1996), cert. denied, 522 U.S. 811 (1997); *Planned Parenthood Shasta-Diablo v. Operation Rescue* (Butte County Super. Ct. No. 115924) (filed 3/93); *Kenneally v. Operation Rescue* (L.A. Super. Ct. No. BC 075178) (filed 3/93); *Dym v. White* (San Diego Super. Ct. No. 670970) (filed 11/93); *Redding Feminist Women's Health Center v. Operation Rescue* (Shasta County Super. Ct. No. 112314) (filed 11/94).

Outside California: *Planned Parenthood League of Massachusetts v. Operation Rescue*, 406 Mass. 701, 550 N.E.2d 1361 (1990); *Roe v. Operation Rescue*, 710 F. Supp. 577 (E.D. Pa. 1989), *aff'd in part and rev'd in part*, 919 F.2d 857 (3d Cir. 1990); *Southwestern Medical Clinics of Nevada, Inc. v. Operation Rescue*, 744 F. Supp. 230 (D. Nev. 1989); *Volunteer Medical Clinic v. Operation Rescue*, 948 F.2d 218 (6th Cir. 1991); *Aradia Women's Health Center v. Operation Rescue*, 929 F.2d 530 (9th Cir. 1991); *Women's Health Care Services, P.A. v. Operation Rescue-National*, 773 F. Supp. 258 (D. Kan. 1991), *aff'd in part and rev'd and remanded in part*, 24 F.3d 107 (10th Cir. 1994); *Lucero v. Operation Rescue of Birmingham*, 954 F.2d 624 (11th Cir. 1992); *National Organization for Women v. Operation Rescue*, 726 F. Supp. 300 (D.D.C. 1989), 747 F. Supp. 760 (D.D.C. 1990); *National Organization for Women v. Operation Rescue*, 726 F. Supp. 1483 (E.D.Va. 1989), *aff'd*, 914 F.2d 582 (4th Cir. 1990) (per curiam), *rev'd sub nom. Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993); *New York State NOW v. Terry*, 886 F.2d 1339 (2d Cir. 1989), cert. denied, 495 U.S. 947 (1990); *Birmingham Women's Medical Center v. Oper-*

Respondents strenuously rejected any attempt by defendants to distinguish between various entities or associations bearing the name "Operation Rescue," instead insisting that all such organizations were subsumed in the one defendant Operation Rescue. See, e.g., Tr. at 1296-98; 1299-1300; 3152-55. The Permanent Injunction issued by the court names "Operation Rescue, a/k/a Operation Rescue National" as the enjoined party. Pet. App. 270a. Assuming *arguendo* that all anti-abortion entities bearing the name "Operation Rescue" are indeed one and the same, then the same defendant sued in this action by the class of "all women's health centers in the United States which perform abortions" has over the past decade been repeatedly sued by individual women's health centers in numerous other actions.[16] These actions all arose out of the same conduct or course of conduct which was the subject of the lengthy litigation in the instant case.

The most intriguing example of the abortion provider's "two bites at the apple" approach is the case of *National Abortion Federation, et al. v. Operation Rescue, et al.*, No. CV 89-1181 (AWT) (C.D. Cal.) (filed 3/1/89) (hereinafter "*NAF v. OR*"). In that case, plaintiffs included not only the National Abortion Federation (representing its forty-eight member clinics in the state of California)

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ation Rescue, No. CV-89-P-1261-S (N.D. Ala. Aug. 2, 1989); *Operation Rescue v. Women's Health Center, Inc.* 626 So.2d 664 (Fla. 1993 (per curiam), *aff'd in part, rev'd in part sub nom. Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994); *Planned Parenthood League of Mass. v. Operation Rescue*, 406 Mass. 701, 550 N.E.2d 1361 (1990); *Vermont Women's Health Center v. Operation Rescue*, 617 A.2d 411 (Vt. 1992); *Operation Rescue-National v. Planned Parenthood of Houston and Southeast Texas, Inc.*, 937 S.W.2d 60 (Tex. Ct. App. 1996), modified, 975 S.W.2d 546 (Tex. 1998); *Planned Parenthood of the Rocky Mountains, Inc. v. Operation Rescue National*, No. 93 CV 4266 (Colo. Dist. Ct. Aug. 10, 1993); *Women's Health Center of Duluth v. Operation Rescue*, No. CO-93-601157 (Minn. Dist. Ct. July 28, 1993).

[16] Because the lower court in the instant action placed under permanent seal the names of the clinics which were included in and which opted out of this class action, Amicus has no way of knowing how many of the clinics in these subsequent lawsuits are also included in the Clinic Class. However, as Respondents represented to the court that only eleven clinics had opted out, it is clear that many of these clinics which sued Operation Rescue individually were also part of the Clinic Class in this action.

but thirteen other California abortion providers or affiliates of California abortion providers.

In *NAF v. OR*, plaintiffs proposed the certification of two classes: 1) all women who seek medical care from family planning and abortion service providers and are deprived of that care by defendants' actions, and 2) all family planning clinics, abortion and other gynecological care providers and women's clinics which are unable to provide care because of the defendants' action. Complaint, ¶ 22.[17] Included among the defendants was "Operation Rescue," identified as "an unincorporated association with offices in Binghamton, New York and Garden Grove, California." Id., ¶ 28. Plaintiffs subsequently named Randall Terry as Doe 1. Id. at ¶ 33.

The most specific allegations in the complaint dealt with two blockades occurring in Los Angeles on February 11, 1989, at the Westside Women's Medical Clinic and the Pico Women's Medical Clinic. Complaint, ¶¶ 41-45. These are the very same blockades about which Respondents presented extensive testimony at the trial in the instant matter. Tr. 1514-26.[18] Indeed, one of the class representative plaintiffs in *NAF v. OR*, Carolyn Thompson, is none other than the witness who testified as the Respondents' Third Anonymous Witness in the instant action.[19]

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[17] For the convenience of the Court all the pleadings and orders in *NAF v. OR* referenced in this brief were lodged with the Court in conjunction with the Motion of Life Legal Defense Foundation to File Brief as Amicus Curiae and Brief in Support of Petitioners in support of their Petition for Certiorari in this case.

[18] See Tr. at 1515 for identification of date and location of the incident.

[19] See Complaint ¶ 45: "One woman, who was scheduled for a post-operative appointment for follow-up examination following a hospitalized abdominal surgery, had to be treated on an emergency basis at an alternative location. Although this woman, plaintiff Carolyn Thompson, informed the blockaders that she was not pregnant and did not seek an abortion, defendants still prevented her from obtaining necessary medical care." Strangely, the *NAF v. OR* complaint, filed less than three weeks after the incident, does not contain any allegations of violence similar to which the Third Anonymous Witness testified to at trial in the instant matter. Tr. 1518-21.

On March 2, 1989, plaintiffs NAF, et al., moved for and were granted a temporary restraining order prohibiting trespass, blocking, and physically abusing persons entering or leaving abortion facilities. See Temporary Restraining Order.

Plaintiffs NAF, et al., subsequently filed a motion for contempt findings against several individuals, including Defendant Joseph Scheidler and various individuals associated with Operation Rescue, based in part on a blockade which occurred at the Chico Feminist Women's Health Center on March 11, 1989. On March 13, 1989, the plaintiffs filed declarations from Dido Hasper and Penny Bertsch which stated that hundreds of copies of the federal temporary restraining order were served on participants in the blockade. See Supplemental Exhibits in Support of Request for Civil Contempt Fines.

In the instant case, Respondents called these same two witnesses, Dido Hasper and Penny Bertsch, to testify about this same blockade. These witnesses never mentioned in their testimony that a federal temporary restraining order (obtained in *NAF v. OR*) was served on all participants at the March 11 blockade. In fact, in response to a question from defense counsel about whether they had already filed a lawsuit (*NAF v. OR*) to get an injunction against that protest, Ms. Hasper testified: "No. We had filed—an attorney for us had filed a lawsuit to get an injunction against the regular protestors who were in front of the clinic. We had no idea that 500 or 400 people from Operation Rescue were going to drive up from Sacramento on that day. *So we had nothing against them.*" Tr. at 1429-30 (emphasis added).

Chico Feminist Women's Health Center was already at the time of this incident a named plaintiff in *NAF v. OR*. Complaint at ¶ 8, and it immediately sought an adjudication of contempt for violation of the court order issued in that case. Nonetheless, the district court in the instant action relied on evidence of this blockade as grounds, ten years later, for issuing further relief in the form of a nationwide injunction. Pet. App. 236a-37a.

On March 15, 1989, plaintiffs NAF, et al. were granted a preliminary injunction. A copy of this injunction, which is still in effect, is lodged with this Court. *See* footnote 17, *supra.*

Before plaintiffs in *NAF v. OR* could move for certification of the classes, however, defendants moved to dismiss the case for failure to state a claim under 42 U.S.C. § 1985(3), plaintiffs' only federal claim. The court granted the motion with leave to amend, 721 F. Supp. 1168 (C.D. Cal. 1989), and, after plaintiffs' amendment, granted a subsequent motion to dismiss without leave to amend.[20] Plaintiffs appealed the dismissal, and sought and were granted a stay of the order dissolving the preliminary injunction, pending expedited appeal.

In 1993, the Ninth Circuit reversed the order dismissing the suit and remanded the case to the district court. *National Abortion Federation v. Operation Rescue*, 8 F.3d 680. Defendants filed a petition for rehearing, which was denied in 1994. The case was then remanded to the district court, where the preliminary injunction now continues to pend, no trial having ever been conducted.

Thus, for over thirteen years, there has been and continues to be an enforceable federal court order enjoining Operation Rescue from trespass, blockades, and physical harm in the state of California. Two of the five incidents singled out for mention by the lower court in issuing the injunction in this case, Pet. App. 236a-37a, were also used as the basis for injunctive relief in *NAF v. OR.*[21] The court went on to state, "Repeatedly, witnesses testified to the fear and intimidation they felt from the actions of the protesters," citing three examples, two of which were from these same *NAF v. OR* incidents. Pet. App. at 237a-38a.

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[20] The motion was granted on substantially the same grounds relied on by this Court four years later in *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993).

[21] A third incident cited by the court, that of the protests in Milwaukee, Wisconsin, was also the subject of litigation which resulted in an injunction. Cf. Pet. App. 235a-36a and Tr. at 1914-16, with *State v. Baumann*, 1995 Wisc. App. LEXIS 261 at *3-*4.

The example of *NAF v. OR* highlights the inappropriate, duplicative nature of the "nationwide" injunction issued by the lower court. Not only is such broad relief unnecessary,[22] but it unfairly subjects the defendants (and those "in concert" with them) to the threat of multiple contempt actions arising from the same incidents of allegedly contemptuous conduct, mirroring the redundant lawsuits to which the defendants have already been subjected.

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[22] One commentator, approving of the Seventh Circuit's conclusion, has criticized the Seventh Circuit only for failing to stress the inadequacy of private party injunctive relief under FACE (18 U.S.C. § 248) as a further ground for private party injunctive relief under RICO. Comment, 125 Harv. L. Rev. 1745 (2002). This commentator notes that FACE expressly provides private individuals injunctive relief against anyone who injures, intimidates or interferes with a person seeking "reproductive health services." *Id.* at 1750. But injunctive relief under RICO is necessary, according to this commentator, because it can enjoin high level "anti-abortion protest leaders" while FACE cannot reach beyond the street level activists at the entrances to "reproductive health facilit[ies]." *Id.* Thus the commentator concluded that civil RICO has a "unique value in resolving statutory gaps in the anti-abortion context." *Id.* at 1751.

However, the comment fails to provide any legislative history to explain how it could be that Congress, in adopting FACE in 1994, understood RICO adopted in 1970, three years before the Supreme Court had discovered a constitutional right to abortion, would provide a remedy for FACE's deficiencies. Consider Congress in 1994 debating the need to protect persons from being physically denied entrance to "reproductive health facilities." Congress determines that existing federal law—including presumably RICO—was inadequate to protect the right to access "reproductive health facilities." It then frames legislation—which expressly affords private parties the right to sue in federal court for damages and injunctive relief. It entitles that legislation, the Freedom of Access to Clinic Entrances Act ("FACE"). By that Act, Congress seeks to afford prosecutors and private parties a comprehensive set of remedies to ensure continued unimpeded access to "reproductive health facilities."

Consider what Congress did not do—and apparently felt it need not do—when it enacted FACE, which created a new federal felony. Congress did not add that felony to the felonies which may constitute "predicate acts" under RICO. If legislative history has any place in statutory analysis, it cannot supply any arguments for Respondents. There is no basis for contending that "RICO and FACE working together, offer reproductive health clinics and their staffs and patients comprehensive relief from anti-abortion protest violence . . . that neither statutory scheme could provide alone." *Id.* at 1746.

It behooves this Court, therefore, to carefully review whether Congress ever intended when enacting RICO to afford private litigants the right to nationwide federal injunctions when the conduct they seek to enjoin could be sought in and granted by state courts, which have the advantage of local perspective and proximity to the witnesses and parties traditionally required of equity courts.

Vesting federal courts with the power to issue nationwide injunctive relief will not only seriously alter the relationship of state and federal courts, it will result in conflicting, overlapping and duplicative injunctions and multiple contempt proceedings for single violations. This is especially pernicious where the injunctive relief impinges on protected First Amendment rights.

Conclusion

For the foregoing reasons, this Court should reverse the judgment of the Seventh Circuit.

Respectfully submitted,

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